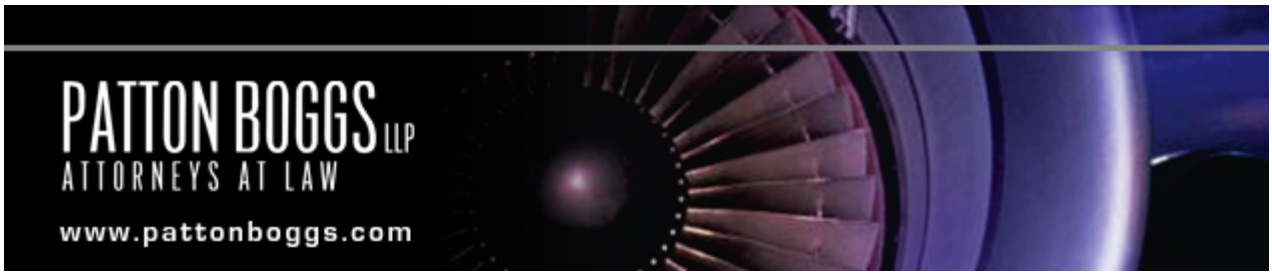

Newsletters

Criminal Antitrust Update - December 2011 December 19, 2011

INDUSTRY SCORECARD

Shipping Industry: Sea Star Line LLC (Sea Star) agreed to plead guilty to one count of violating the Sherman Act and will pay a $14.2 million criminal fine for its role in a conspiracy to fix the price of freight services between the United States and Puerto Rico. The president of Sea Star was also indicted for his role in the conspiracy. According to the Department of Justice (DOJ), Sea Star and its competitors agreed to divide customers and fix shipping rates and surcharges for services between the United States and Puerto Rico from 2002-2008. Horizon Lines LLC pleaded guilty in February and agreed to pay a $45 million fine, which was later reduced to $15 million. DOJ earlier secured guilty pleas and substantial prison sentences, in some cases, from Horizon and Sea Star executives for their role in the conspiracy.

Banking Industry: DOJ is investigating several large banks for possible collusion regarding monthly debit card fees. While Bank of America Corp., JP Morgan Chase & Co., and Wells Fargo & Co. eventually decided not to impose a monthly debit card fee, DOJ indicated in a November 16, 2011, letter to Representative Peter Welch (D-VT) that it “is reviewing the statements and actions by banks and their trade associations regarding possible increases in consumer fees for using debit cards.” DOJ’s investigation stems from a letter by Representative Welch and others to Attorney General Eric Holder asking that DOJ investigate the banks for price collusion and price-signaling. Each bank announced a monthly debit card fee within days of each other.

Airlines and Airline Ticketing: Last month, a Texas federal judge dismissed part of a lawsuit in which American Airlines Inc. (American) accused three leading global distribution system (GDS) companies of antitrust violations for monopolizing how fare and flight data are distributed to travel agents. U.S. District Judge Terry R. Means dismissed all of American’s claims against Orbitz Worldwide LLC, and some of its claims against Sabre Holdings Corp. and Travelport Ltd. American filed its antitrust suit against Sabre, Orbitz, and Travelport, the leading GDS companies, alleging that the companies retaliated against the airline after it entered the GDS market through its “AA Direct Connect” system. The judge’s order was sealed, but American indicated that it was given leave to add new claims and/or new parties to the action.

Health Care: DOJ announced in early November that it entered into a settlement with New West Health Services Inc. (New West), the second largest commercial health insurance provider in Montana. According to DOJ, New West agreed to sell one-third of its customers to Blue Cross and Blue Shield of Montana, Inc., in exchange for $26.5 million and two seats on Blue Cross’s Board. DOJ alleged that this agreement violated the antitrust laws because it eliminated competition for health insurance in the State of Montana. Blue Cross and New West are the only significant providers of commercial health insurance in Montana and have 75 percent and 12 percent of the commercial health insurance market, respectively. Under the settlement, New West is required to sell the majority of its commercial health insurance business to third parties.

Rolling Bearings: The European Union (EU) conducted surprise raids of several rolling bearings manufacturers, including SKF AB of Sweden, in November 2011. Regulators are investigating possible violations of EU competition law in the bearings industry. SKB AB and other rolling bearings manufacturers are suspected of engaging in concerted practices and entering into agreements that could stifle competition.

RECENT DOCUMENT DISPUTES IN DOJ’S ACTION TO BLOCK AT&T/T-MOBILE MERGER

DOJ’s recent action to block the AT&T/T-Mobile merger has raised interesting questions about the disclosure of documents made available to DOJ in a merger investigation. Specifically, third parties challenging the merger have made significant efforts to obtain access to merger-related documentation submitted to DOJ. Recently, Sprint filed a lawsuit similar to the DOJ efforts to block the AT&T/T-Mobile merger. Consequently, Sprint sought documents submitted to DOJ by AT&T and T-Mobile in the litigation initiated by DOJ. DOJ supported Sprint’s request for the documents; Sprint has argued that the merger would hurt consumers and competition in the cell phone market.

The U.S. District Court denied Sprint’s request for merger-related documents, which are confidential and covered under a

protective order, on the grounds that it would slow down the DOJ action and give Sprint special privileges to which it is not entitled. At the same time, AT&T served a subpoena on Sprint requesting all documents Sprint provided to DOJ in the months prior to the filing of the DOJ suit and related to Sprint's opposition to the proposed merger. A Special Master presiding over the case ordered Sprint to produce the requested documentation, including documents analyzing the merging parties' competitive position. The Special Master based his opinion on the public's interest in resolving the merger dispute quickly and the lack of burden on Sprint to produce the documents. AT&T is also challenging DOJ's attempt to share data submitted by AT&T with the FCC, which also has an interest in the merger. As with Sprint, AT&T has argued that third-parties are not entitled to documents submitted by AT&T to DOJ and covered by an existing protective order.

Third parties, including litigants in other actions, public interest groups and the media often seek access to documents produced in litigation and covered by protective order. Under Rule 26(c) of the Federal Rules of Civil Procedure, federal courts have the authority to enter orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Under Rule 26(c)(7) "a trade secret or other confidential research, development, or commercial information [may] not be revealed or be revealed only in a designated way." When a party seeks access to documents covered under a protective order, either by seeking to modify or vacate the order, it must demonstrate that the protective order was "improvidently granted" or that there is some "extraordinary circumstance" or "compelling need."

While third parties with an interest in mergers and acquisitions have become increasingly aggressive about seeking access to documents covered by a protective order, AT&T has been very successful in blocking access. The "expedited schedule" designed to resolve the merger dispute quickly, which the courts feel is in the public interest, has helped block secondary litigation and document disclosures that could hamper the resolution of the merger contest. Using a public interest argument to block document disclosures is a relatively novel idea, considering that third parties often use the public interest to support disclosure.

COMMENT: REVOCATION OF LENIENCY AGREEMENTS

DOJ's Antitrust Leniency Program has become its most important tool for detecting and prosecuting cartel activity. Under the program, companies can avoid criminal prosecution by voluntarily disclosing cartel activity that was not previously under DOJ investigation or otherwise disclosed. Being a "first in the door" amnesty applicant can immunize a company from criminal prosecution but requires full cooperation with DOJ, including providing all evidence in its possession of the alleged conspiracy. The company must also take "prompt and effective" action to terminate its involvement in the cartel activity. Companies that cooperate early as "second in" leniency applicants can often benefit from reduced fines.

DOJ states that it can revoke an amnesty or leniency agreement with a company before it issues a Final Leniency Letter if it believes that the company has failed to cooperate fully with a DOJ investigation. The revocation of a leniency agreement would be highly detrimental, exposing the leniency applicant to criminal prosecution and fines. DOJ efforts to revoke leniency agreements are rare.

In a case across the Atlantic, the UK's Office of Fair Trading (OFT) recently considered revoking the leniency application of Virgin Atlantic Airways Ltd. (Virgin Atlantic), possibly subjecting the company to prosecution for its role in a conspiracy with British Airways PLC to fix passenger fuel surcharges. In 2007, Virgin Atlantic voluntarily admitted its involvement in a price-fixing conspiracy relating to airline passenger rates. The OFT granted Virgin Atlantic immunity from prosecution in exchange for cooperation in the OFT's investigation of other cartel participants. However, in May 2010, OFT was forced to withdraw claims against several British Airways employees. During a trial, the defense relied on email communications between British Airways and Virgin Atlantic that Virgin had failed to provide to OFT regulators. Critics claimed that Virgin Atlantic's failure to produce those documents breached its cooperation agreement with the OFT.

The OFT ultimately declined to revoke the immunity agreement, finding that Virgin's failure to provide the additional email correspondence was not a "noncooperation such as to warrant the revocation of the [agreement]." Virgin Atlantic's cooperation helped OFT obtain a guilty plea and a $186 million fine from British Airways.

DOJ's first and only attempt to revoke a leniency agreement and prosecute an applicant resulted in a federal court injunction that preserved the agreement. *United States v. Stolt-Nielsen* S.A., 524 F. Supp. 2d 609, 628 (E.D. Pa. 2007). In *Stolt-Nielsen*, the company voluntarily admitted to participating in a customer allocation conspiracy with competitors in the parcel tanker industry. DOJ executed a letter agreement formalizing the immunity and ultimately obtained convictions and fines against third parties using the information provided by Stolt-Nielsen. DOJ then revoked the immunity agreement on the grounds that Stolt-Nielsen did not terminate its involvement in the conspiracy until one year after it originally claimed. The court, in refusing to allow DOJ to revoke the agreement, noted that the immunity agreement did not include the date that Stolt-Nielsen allegedly terminated its involvement in the conspiracy. The court refused to acknowledge any tacit or oral agreement between DOJ and Stolt-Nielsen about the specific date the company allegedly exited the conspiracy. The court also held that DOJ acted unfairly by benefitting from the voluminous information provided by Stolt-Nielsen and then trying to deny the company the benefit of immunity. Most importantly, the court held that leniency and immunity agreements, like non-prosecution agreements, can be judicially enforced.

The *Stolt-Nielsen* case was a particularly embarrassing setback for DOJ. The success of the Leniency Program depends on a

company's ability to trust that federal regulators will hold up their side of the bargain. However, trust is a two-way street. As seen in Virgin Atlantic, all companies that participate in a leniency program, whether with the DOJ, EU, or OFT, must remember to adhere to the conditions and obligations set forth in the agreement in order to preserve immunity from prosecution. Virgin's particular circumstances also underscore the impact that an inadvertent or negligent error, even on issues so seemingly mundane as searching for, identifying, and producing relevant documents, can potentially have on a cooperative relationship with the government.